United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7663

To be Argued by
MURRAY GARTNER

United States Court of Appeals

For the Second Circuit

Docket No. 75-7663

AJAX HARDWARE MANUFACTURING CORPORATION,
Plaintiff-Appellant,

v.

INDUSTRIAL PLANTS CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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Summary Response

To justify the district court's order setting aside the jury verdict on liability in the first trial, Industrial's brief cites cases to the effect that a compromise verdict must be set aside, and says that a district judge's finding that a verdict was a compromise will not be lightly disturbed on appeal. Industrial, however, deals lightly, even inattentively, with the record facts which compel the conclusion that the district judge was clearly wrong, under

any standard of review,* in drawing the inference that this jury compromised on the question of liability. Since there was no basis for an inference of compromise, but, on the contrary, practical certainty that the jury unanimously agreed on Industrial's liability, it was clear error to set aside the jury's verdict on that question.

Industrial's brief on the errors committed at the second trial gives unexpected support to Ajax's contention that critical issues were unjustifiably removed from the jury's consideration. For Industrial itself lists the major issues of the case which it is apparent, without argument, that the jury was not asked to decide. Industrial's brief attempts to show that those issues would have had to be decided against Ajax, but its argument at all points depends entirely on misstatement of or failure to refer to the record evidence.

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*"[L]ess appellate deference need be accorded to a ruling of the trial judge which is opposed to the verdict than to a ruling which is in support of it." *Reinertsen v. George W. Rogers Construction Corp.*, 519 F. 2d 531, 532 (2d Cir. 1975); *Massey v. Gulf Oil Corp.*, 508 F. 2d 92 (5th Cir.), *cert. denied*, U. S. , 96 S. Ct. 67 (1975), and "close scrutiny" of a ruling which overturns a jury's verdict "is required to protect the litigants' right to a jury trial," *Lind v. Schenley Industries, Inc.*, 278 F. 2d 79, 90 (3d Cir.), *cert. denied*, 364 U. S. 835 (1960). *See also Taylor v. Washington Terminal Co.*, 409 F. 2d 145, 148 (D.C. Cir.), *cert. denied*, 396 U. S. 835 (1969); *Grove v. Dun & Bradstreet*, 438 F. 2d 433 (3d Cir.), *cert. denied*, 404 U. S. 898 (1971).

I

The First Trial

A. Industrial Has Failed to Show That the Essential Predicate to a Finding of Compromise by the Trial Court was Present.

The district judge's determination to set aside the first jury's verdict in Ajax's favor on the ground that it represented an improper compromise was based on a stated "inherent inference" drawn from the "obviously unjust and inadequate verdict" of $70,000 (A-112). There is no dispute here over the district court's finding that the $70,000 awarded by the jury was inadequate (A-111-112). Ajax and Industrial both urged its inadequacy—and the district court so found. What is disputed is that it was proper to infer a compromise on liability from the inadequacy of the jury's damage award. Such an inference plainly is not justified by, let alone "inherent" in, the record facts.

That inference of a compromise depends completely on the premise that the jury *knew* that the proper amount of Ajax's damages was $161,895.75. If the jury believed that it could properly award less than that amount to plaintiff, following its finding of Industrial's liability, all that can be said is that it was wrong in that belief, and nothing is indicated as to the prior finding of liability. In other words, if a jury is told that on finding liability, it must award $100, and it awards $50, an inference may arise that the jurors decided to find the defendant "half-liable". But if the jury is led to believe that it may award any amount up to a limit, the award of an amount less than that limit cannot give rise to any inference about compromise on the question of liability.

The district judge explained his decision that the inadequate award gave rise to the "inherent inference" that it was the product of a compromise by saying that "defendant has essentially stipulated this sum [$161,895.75]" (A-111) and that "the jury's award of $70,000 is substantially below the essentially undisputed liquidated damages of $161,895.75 in this case" (A-112). But the jury was not aware that the amount of damages had been "essentially stipulated" and "essentially undisputed" for the very good reason that that did not happen during the trial. Since the jury did not know that the damages were liquidated and undisputed and were not so instructed, it is offensive to any sense of justice to permit the court's unwarranted inference to be based upon an explanation which, by backdating Industrial's "stipulation", not only maligned the jury, but greatly injured Ajax.

Industrial has, in effect, conceded that the premise for the inference did not exist, for (1) it itself says that the judge charged the jury only that it could not award *more* than $161,895.75* and (2) it cannot say that the amount of damages was "undisputed" or "stipulated" during the trial.**

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*Thus, Industrial states "The specific figure [$161,895.75] was presented to the jury by the trial judge during his charge as the *maximum amount* of any award by the jury (A-971)" (Ind. Br., p. 7; emphasis added). It does not dispute that Ajax requested a charge which would have fixed the amount of damages in the event the jury determined Industrial to be liable, and that the Court refused to give such a charge. (Ajax Br., p. 22; and see A-998).

**The best that Industrial can do to make it appear that there was no dispute about the amount of damages during the trial is to say:

> "The compromise nature of the verdict was pointed up by the fact that the amount of damages claimed by Ajax at that first trial was liquidated and *virtually unopposed;* and this circumstance was a compelling fac-

Industrial's post-verdicts concession that damages were "liquidated"—a concession clearly made then as the necessary predicate to its motion to set aside the verdict on liability—cannot supply the ingredient missing from what the jury was told. The district judge himself concluded *after* the verdicts were returned that damages in the case were "probably unliquidated." (A-1003).

Industrial has not challenged Ajax's central premise on this appeal that the damage award is clearly explainable, although not excusable, by the impression given by the judge's charge and the special verdict form that the jury had discretion to award *less* than the amount claimed by Ajax, and by Industrial's own improper suggestions in its summation that Ajax may not have "really lost that $170,000" (A-930) and that the jury could reduce the amount of damages by speculative and unspecified amounts (A-927, 929-931).* The cases cited by Industrial

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(footnote continued)

tor in the decision reached by the trial judge (A-111, 112) that a compromise had tainted the verdict." (Ind. Br., p. 9; emphasis added)

Of course, the damages "claimed by Ajax" were liquidated, but Industrial did not, during the trial, so concede. While the amount of damages may have been "virtually" unopposed by evidence, it was in fact, opposed very forcefully in Industrial's summation. Industrial suggested to the jury that Ajax had suffered no damages and also invited it to deduct from any damages speculative amounts of possible recoveries from others (Ajax Br., pp. 36-38; A-929-931).

*Industrial, moreover, contested the amount of damages in its contentions set forth in the pre-trial order, claiming that the acceptance of a standby guaranty from Industrial would have mitigated Ajax's risk and that the proceeds from the sale of machinery not sold in the auction "mitigate and reduce the damages alleged here." (A-22-23). These contentions were never dropped, and Ajax and Industrial both submitted evidence relevant to the contentions as to the guaranty (DX K, E-117; A-635-637), and the machinery not sold at the auction, which was subsequently purchased by Ajax for $20,000 (PX 23, E-133; PX 16, E-264; PX 11, PX 15, PX 17 [not reproduced in Appendix]; A-626).

(Ind. Br., p. 9) which suggest (in *dicta*) that a verdict may be found to be a compromise where the jury awards less than the sum known to them to be the liquidated damages, are obviously inapplicable here where not even the trial judge, let alone the jury, saw this as a suit for liquidated damages while it was being tried.*

The district court clearly erred in not considering, or giving any weight to, facts which showed that the jury's inadequate damage award was explained by and consistent with the jury's obvious understanding that they had discretion to award damages in any amount *up to* the maximum claimed by Ajax, in accordance with the court's charge (See Ajax Br., pp. 38-39). Most significantly, the court made no reference in its opinion to the jury note which it had received and which left no doubt that the jury was *not* "hopelessly deadlocked"** ten minutes before they re-

*See *Maher v. Isthmian Steamship Company*, 253 F. 2d 414, 417 (2d Cir. 1958), and the New York cases cited by this Court there, in which the courts specifically charged the juries that they had to award damages in a given amount, if they found liability, *e. g.*, *Friend v. Morris D. Fishman, Inc.*, 302 N. Y. 389 (1951); *Clark v. Foreign Products Co.*, 194 App. Div. 284, 185 N. Y. Supp. 99 (1st Dept. 1920).

**This was what Industrial asserted in its brief and affidavit to the district court in support of its motion to set aside the verdict on liability, and it continues to say to this Court (Ind. Br., p. 9, footnote) that the foreman reported that the "jurors could not agree", when in fact he reported that they were in unanimous agreement on Questions 2-5, but could not agree only on Question 1. Industrial suggests that there is reason to doubt that Ajax's counsel was unaware of the contents of the note at the time that Ajax filed its briefs in support of its motion to vacate the special verdict on damages but to let stand the special verdict on liability. But it simply cannot be believed that Ajax would permit Industrial's statement that the jury's note showed they were "hopelessly deadlocked" to remain unchallenged if Ajax had known that the note said the opposite. The significant fact is not that Ajax did not raise in its main and reply briefs to the district judge a point not known to it (see

turned with the fully completed special verdicts, but were in unanimous agreement on liability, and damages (Ct. Ex. 4, E-275).

At least one clear, and we believe, irrefutable statement may be made about that note: no jury which had disregarded the court's instructions to determine liability first before going on to the damage question and had compromised the liability and damage questions would have sent the note. It is inconceivable that a jury would compromise the basic questions and yet report to the court that they had been unable to agree on one alternative theory of liability.*

(footnote continued)
A-105 where in his affidavit in support of Ajax's post-verdicts motion, Ajax's counsel made clear that he was unaware of the contents of the note, except as summarized by the judge), but that the judge, in his opinion, did not inform counsel of the true content of the note, *known to him*, and did not explain how he could infer a compromise in the face of the note's evidence that there was no compromise.

*Contrary to Industrial's assertion, Ajax's argument "that the expression [100% agreement] denoted a 'unanimous' determination in Ajax' favor 'on at least one theory of liability' presumes that the jurors had actually answered the damage Question affirmatively" (Ind. Br. p. 10), what is clear is that the jury *must* have answered either Question 2 or Question 3 as to liability in the affirmative because they were expressly instructed by the court not even to consider Questions 4 and 5 if they had not answered yes to one of the first three questions. Therefore, when they reported 100 per cent agreement on Questions 2, 3, 4, and 5, there is no alternative to the conclusion that they answered yes to either Question 2 or Question 3. As it turned out, when the full special verdict form was handed up to the Court, it was Question 2 to which they had answered yes.

The suggestion that "100% agreement" could have meant a tentative determination that there was *no* liability and no need to consider the damage question, is really a desperate attempt to make words mean whatever Industrial would like them to mean. The jury, which was so meticulous as to tell the Judge they had not reached agreement on Question 1, would not say that they had reached agreement on Questions 2, 3, 4 and 5 if what they meant was that they had not answered Questions 4 and 5.

Industrial essentially ignores the compelling facts which establish that this jury did not compromise on liability and argues for a rule of law that would make a district court's finding of a compromise, no matter how contrary to the evidence, well-nigh unassailable. Thus, Industrial cites four cases for the proposition that "where the trial judge is satisfied that the verdict reflects the improper pacification of discordant views among jurors, it is plainly within his judicial discretion (indeed, practically mandatory) for him to direct a new trial of all the issues, liability as well as damage." (Ind. Br., p. 6).

Three of the cases do not, however, support that exaltation of judge over jury, unqualified by any statement that the judge's determination must be based on evidence, not improper inference or mere fiat; and the fourth is plainly distinguishable. Two of the cases did not even concern questions of compromise by the jury.

In *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494 (1931), the Supreme Court said it was not unconstitutional for a Court of Appeals to have ordered a new trial on damages alone, but reversed and ordered a new trial on all issues because of the detailed interrelationship in that case between the nature of the liability and the amount of damages. There was no question of compromise; the new trial was required because of an erroneous charge as to damages. In *Rivera v. Farrell Lines*, 474 F. 2d 255 (2d Cir. 1973), this Court reversed and ordered a new trial where the issue of contributory negligence was improperly submitted to the jury. In that case a new trial on liability was required also, since there was no way of determining how much the finding of contributory negligence reduced the verdict, or whether there would even be such a finding on a proper charge. Similarly, in *Caskey v. Village of Wayland*, 375 F. 2d

1004, (2d Cir. 1967), a new trial was ordered on the ground that prejudicial error in the judge's charge as to damages required a new trial. This Court held that the new trial should cover liability as well, since the small verdict returned by the jury in that case where, unlike here, liability was not separately determined, and the size of the verdict was otherwise unexplained, may well have indicated that the verdict represented a compromise. The one remaining case, decided forty years ago and before the adoption of the Federal Rules of Civil Procedure, *Schuerholz v. Roach*, 58 F. 2d 32 (4th Cir.), *cert. denied*, 287 U.S. 623 (1932) has been distinguished and severely limited in subsequent decisions by the Fourth Circuit, as discussed in our initial brief, pages 41-45.

Other cases cited by Industrial at pages 5-6 of its brief are even less relevant here. *Reinertsen v. George W. Rogers Construction Co.*, 519 F. 2d 531 (2d Cir. 1975), and *Cosentino v. Royal Netherlands S.S. Co.*, 389 F. 2d 726 (2d Cir. 1968) both involved review of a decision ordering a new trial where the trial court found the damages to be "excessive". In *Reinertsen*, where the new trial was ordered on damages alone, this Court said the judge's view that the damages awarded by the jury exceeded the permissible range deserved "considerable deference"—although less deference than would be accorded to a decision upholding a verdict (see p. 2, above). *Legal Aid Society v. Herlands*, 399 F. 2d 343 (2d Cir. 1968) reviewed an order denying a request to relieve counsel in a criminal case; this Court commented on the trial judge's unique first-hand ability to determine counsel's continued ability to represent the defendant.

In whatever light the action of the district court is viewed, it was plainly wrong. It ignored the compelling facts which showed there was no compromise; it ignored the district court's instructions and defendant's improper statements to the jury which explained the inadequacy

of the verdict; it backdated defendant's concession of which the jury was unaware; and it attributed dereliction of duty to a jury which observed the judge's instructions meticulously. It did Ajax a grave injustice which cannot be justified under any pretense that it is a factual finding not to be disturbed upon review by this Court.*

B. Cases Cited by Industrial Do Not Support the Finding of a Compromise in This Case.

The cases cited by Industrial in which courts determined there were compromise verdicts are not similar to this case, because they were largely personal injury cases in which the juries were so instructed that they knew that

*Industrial suggests that Ajax has abandoned its claim of improper conduct by the district judge (Ind. Br., p. 2). On the contrary (see Ajax Br., pp. 75-76), the size limit of appellant's brief compelled the decision to use those pages to show that the court's errors in rulings required reversal independently of its improper conduct. That conduct, however, in many instances led to the error specifically committed. Thus, it was the court's failure to allow sufficient time to Ajax for summation and its interference in the opening (A-370) and closing (A-899, 925) statements which contributed to leaving the jury in the dark about how it was to determine the amount of the damages. Portions of the proceedings reproduced in the Joint Appendix show that the judge's impatience, interruptions, tone of voice and partiality to defendant, all hindered the fair presentation of plaintiff's case to the jury. His improper conduct of the trial culminated in treatment of the summations in a way which directly contributed to the jury's failure to understand the amount of the damages.

For the court to infer that the jury compromised rather than that it did the best it could in finding damages, given the way that question was submitted, is to add the unjust imputation of impropriety to failure to properly inform them. It was the court which failed to charge as requested that the amount of damages was fixed; it was the court which permitted Industrial's counsel to suggest improper deductions from the fixed damages; and it was the court which did not permit Ajax sufficient time to discuss damages for the jury. It is grossly unfair to impugn the jury in order to screen the all too obvious failure of the judge to permit plaintiff's case to be presented properly and fairly.

if they found liability they had to award damages in amounts much greater than they did. *Pugh v. Bluff City Excursion Co.*, 177 Fed. 399 (6th Cir. 1910); *Southern Ry. v. Madden*, 235 F. 2d 198 (4th Cir. 1956); *Schuerholz v. Roach*, 58 F. 2d 32 (4th Cir. 1932), *cert. den.*, 287 U.S. 623 (1932); *Bass v. Dehner*, 21 F. Supp. 567 (D.N.M. 1937), *aff'd*, 103 F. 2d 28 (10th Cir. 1939); *Hatfield v. Seaboard Air Line R. Co.*, 396 F. 2d 721 (5th Cir. 1968); *Feinberg v. Mathai*, 60 F.R.D. 69 (E.D. Pa. 1973).*

Industrial draws "particular attention" to *Grimm v. California Spray-Chemical Corp.*, 264 F. 2d 145 (9th Cir. 1959), as a case with "facts identical for all practical purposes to ours." (Ind. Br., p. 11). The Court of Appeals in that case, however, did not pass on the merits of the order of the trial court granting a new trial. The narrow question presented was whether the district court exceeded its jurisdiction in setting aside the verdict and ordering a new trial on all issues, on the court's own motion beyond the time limit prescribed by Rule 59(b).

The Court of Appeals held that under the "unusual posture of affairs," the court had not exceeded its jurisdiction; at the same time, it specifically held that the order was not appealable, and therefore did not review its merits. Since the Court of Appeals did not review the merits, its decision has no value as precedent on the question of whether an inadequate damage award inherently means that there was a compromise on the question of liability.

**United States v. Pleva*, 66 F. 2d 529 2d Cir. 1933) is even less relevant to this case. In that criminal case, an elderly juror with a painful bladder ailment announced in open court that he had agreed to the verdict only because he felt physically unable to maintain his position in favor of defendants. In *National Fire Insurance Co. of Hartford v. Great Lakes W. Corp.*, 261 F. 2d 35 (7th Cir. 1958), the jury awarded exactly one-half the undisputed damages, whose computation had been shown them on a blackboard.

Nor was the *Grimm* case in the district court "identical" to [illegible] As stated in the Court of Appeals' decision, the district court in *Grimm* held that "undisputed" evidence showed that plaintiff suffered minimum damages of $9919 while the jury awarded just $4750. In our case, Industrial disputed the amount of damages suffered by Ajax during the trial (although not afterwards). The *Grimm* decision, moreover, does not state the terms of the judge's charge to the jury with respect to damages, a critical factor in explaining the damage award in the instant case. Finally, the jury's verdict here did not come "after a lengthy deliberation, including a report of their deadlock," (Ind. Br., p. 11) as it did in *Grimm*.

In the *Grimm* case, the jury had deliberated a total of 13-1/2 hours: 45 minutes before its return, the jury stated it was "hopelessly deadlocked" and that "further deliberations would be fruitless." In this case, the jury sent a note back after some four hours of deliberation, stating that it had reached unanimous agreement on 4 of the 5 questions submitted—indicating not "hopeless deadlock", but full agreement in Ajax's favor on liability and damages, and disagreement only over the breach of contract question. No matter how many times Industrial persists in pretending that there was "hopeless deadlock" in this case, the irrefutable evidence of the jury's note gives it the lie. Like the many other unsupported and unsupportable statements it makes, Industrial's easy assertion that the facts of the *Grimm* case are "identical for all practical purposes to our own," shows only its total evasion of the record facts which are controlling in this case.

When it addresses the cases cited by Ajax which show that no inference of compromise can be drawn here, Industrial misstates the facts of some, and simply ignores others. (Ind. Br., p. 14). Thus, it is not true of *Yates v. Dann*, 11 F.R.D. 386 (D.Del. 1951), that "the factual

findings of the jurors on liability were not disputed by defendants," or that in *Devine v. Patteson*, 242 F. 2d 828 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957) there was "clear and irresistible evidence of liability."*

Industrial's misreading of *Young v. International Paper Co.*, 322 F. 2d 820 (4th Cir. 1963), is particularly instructive. That case was not one, as Industrial says, where the jury's "middle award" in a dispute over an unliquidated sum, was rational and explainable (Ind. Br., p. 14). To the contrary, the jury's award in that case of $25,000 was $10,000 *below* the amount of damages fixed by defendant's own expert witness, and some $60,000 less than that which plaintiff's testimony showed; it was not a "middle" award, but an award of clearly inadequate damages, and it led only to a new trial on damages, not to a finding that the verdict on liability was a compromise. That case is a substantial limitation by the Fourth Circuit of its own decision, some thirty years earlier in *Schuerholz v. Roach*, 58 F. 2d 32 (4th Cir. 1932), on which Industrial and the district court have so heavily and inappropriately relied.

Coming back to this Circuit, Industrial's statement that *Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F. 2d 76 (2d Cir. 1971) is "an extraordinary case where the instructions of the trial judge left the jury with an inadequate yardstick to measure damage and therefore warranted a limited retrial" (Ind. Br., p. 14) does not distinguish that decision, but emphasizes its applicability to this case. For not only did the trial judge

*Industrial's statements are equally wrong with respect to "others of that class", if it means by that phrase other cases cited at pages 41 and 47 of Ajax's brief. In *Schottka v. American Export Isbrandtsen Lines, Inc.*, 311 F. Supp. 77 (S.D.N.Y. 1969), excessive damages were awarded, but that hardly detracts from its import as a case demonstrating the propriety of a new trial as to damages alone where liability has been properly determined by a special verdict.

here leave the jury with an inadequate yardstick to measure damage, by his charge and his refusal to charge as requested by Ajax and by his refusal of an additional half-hour for summation to Ajax's counsel so that the question of damages could have been addressed, but Industrial's counsel suggested to the jury that they could deduct speculative amounts from any claimed damages. The jury determination of liability therefore should have been allowed to stand here as it was in *Yodice*.

C. Absent a Proper Finding of Compromise, There is No Justification for a New Trial as to Liability.

Industrial argues that even if there had been no compromise by the jury, a retrial of the question of liability as well as of damages was proper (Ind. Br., pp. 12-15). This superficial argument is easily answered:

(1) The trial court did not rule, as Industrial seems to state, that the inadequacy of the award alone warranted a full retrial on all issues. To the contrary, the district court's ruling was made only in the context of its wrongful conclusion that the verdicts represented a compromise (A-113-114). If the finding of a compromise is reversed—as it must be—the district court has offered no other reason to support granting of a new trial as to liability as well as damages, and none exists.

(2) It is nonsensical for Industrial to say that damages may not be tried separately from liability in this case without injustice to the defendant. (Ind. Br., p. 12). The cases which say that a partial new trial may not be had unless it "clearly appears" that the issue to be retried is "so distinct and separable that a trial of it alone may be had without injustice" (Ind. Br., p. 12), have no application here. In those cases, there is some demonstrable interrelationship between the issue of liability and the question of damages, so that the jury may not properly compute the latter without at the same time considering

the former.* A new trial on the single issue of damages, far from being "extraordinary" (Ind. Br. p. 6), is specifically permitted by F. R. Civ. P. 59(a), commonly ordered where inadequate damages are awarded, and is clearly appropriate here.

(3) Ajax has not claimed that a limited retrial is *always* appropriate when special verdicts are used to determine liability and damages separately. (Ind. Br., pp. 12-13). The cases cited by Industrial to show that a complete new trial has sometimes been ordered despite separate verdicts on liability and damages significantly differ from the instant case, in that in those cases, the jury's findings as to damages were in direct contravention of the court's charge and thus necessarily called into question whether the court's instructions as to liability had been disregarded also. *Hatfield v. Seaboard Air*

*In *Gasoline Products Co., Inc., v. Champlin Refining Co.*, 283 U. S. 494 (1931), for example, the jury could not determine the amount of damages on a counterclaim without also determining the extent of the undertaking and other conditions of the contract allegedly breached. Similarly, in *Rivera v. Farrell Lines*, 474 F. 2d 255 (2d Cir. 1973), the Court ordered a new trial on liability as well as on damages in a Jones Act case where the Court's charge had improperly allowed the jury to consider evidence of contributory negligence, and, the Court said, it was impossible to tell what the total award would have been absent the finding of contributory negligence and the extent to which that finding affected the verdict, or whether there would be such a finding on a proper charge. In *Camalier & Buckley-Madison, Inc., v. Madison Hotel, Inc.*, 513 F. 2d 407 (D.C. Cir. 1975), as well, the relationship between different theories of liability and the amount of damages is carefully explained by the Court. In both *Schuerholz v. Roach*, 58 F. 2d 32 (4th Cir. 1932), and *Caskey v. Village of Wayland*, 375 F. 2d 1004 (2d Cir. 1967) a complete new trial was required because of a finding that the verdict resulted from a compromise; they are therefore completely irrelevant to this issue which assumes no proper finding of compromise.

Line Railroad Co., 396 F. 2d 721 (5th Cir. 1958); *Feinberg v. Mathai*, 60 F.R.D. 69 (E.D. Pa. 1973).*

There is no reason to question the jury's special verdict as to liability in this case, or to doubt that the jury carefully followed the instructions which the court gave. All the evidence shows that it did.

D. Ajax Does Not Ask for Additur but for Judgment n.o.v.

The short and complete answer to Industrial's argument that "No Additur Relief Is Available," (Ind. Br., pp. 15-16) is that Ajax does not seek *additur* but judgment *n.o.v.* *Additur*, as the Supreme Court said in *Dimick v. Schiedt*, 293 U.S. 474 (1935),** is the process of denying a plaintiff a new trial merely on the consent of the defendant to add an additional amount to a legally insufficient verdict. Once again, therefore, Industrial's reliance is misplaced on an inapplicable case. Plaintiff did not seek a new trial on the issue of liability*** and defendant did not offer to increase the award on damages to the amount which it conceded, after the verdicts, was "liquidated" and "undisputed."

**Kiff v. Travelers Insurance Company*, 402 F. 2d 129 (5th Cir. 1968), did not involve an *improper* award by a jury, as Industrial states. In that case the jury's finding in defendant's favor on the basis of a special verdict finding relating to a "borrowed servant" issue, was reversed on the ground that this issue should not have been submitted to the jury. The jury had never reached the damage issue, since the effect of the special verdicts in that case was to hold defendant not liable.

Kiff, *Hatfield*, and *Feinberg* are indeed "inapplicable," as Industrial anticipated we would say, but not for the reason advanced by Industrial (Ind. Br., p. 13) before we had occasion to respond to its citation of those cases.

**Cited at Ind. Br., p. 15.

***Contrary to Industrial's statement (Ind. Br., p. 15) that "the appellant *also* moved to set the verdict aside," confusing the verdict on damages with the verdict on liability.

It is *Decato v. Travelers Insurance Co.*, 379 F. 2d 796 (1st Cir. 1967), which points the way to what should be done here. Industrial's brief notwithstanding, (Ind. Br., pp. 15-16), that decision does not disregard what the Supreme Court said in *Dimick v. Schiedt, supra.* The Court of Appeals for the First Circuit made it clear that it was not discussing *additur* but simply the entry of judgment for the proper amount in any case where there was no dispute about damages, and the jury, having properly found liability, had improperly found the amount of damages. That is what happened here, and that is what Ajax asked the district court to do.

Similarly, we ask this Court to follow what is more than 40-year old Constitutional doctrine, that a new trial on damages alone is proper and permissible when liability has been properly (here, moreover, specially) found. *Gasoline Products v. Champlin Refining Co.*, 283 U.S. 494 (1931). And it is doctrine as old as the common law, and common sense, that when an issue is undisputed, judgment may be entered without a trial, so that in lieu of remand for an unnecessary new trial, the Court should enter judgment *n.o.v.**

E. "Other Considerations" Do Not Justify What the District Court Did.

Industrial's passing mention of other grounds for its post-trial motions, which were not relied upon by the district court in setting aside the verdict, requires only a similarly limited response. The contention that the verdict in Ajax's favor was "against the clear weight of the evi-

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*See 6A *Moore's Federal Practice*, ¶59.08[3] at p. 59-72, the page following Industrial's citation to the inapplicable doctrine of *additur* (Ind. Br., p. 15).

dence" or unsupported by legally sufficient evidence rests on Industrial's reconstruction of the facts according to its own imagination. The argument posits an absence of evidence when there was an abundance. (See Ajax Br., pp. 13-17, 49-53 and pp. 25-33, below.)

The claim of an inconsistency between the jury's verdict on the breach of contract and negligence questions is belied by (1) the district court's "clarifying" charge, in response to the jury's question as to breach of contract, that there was a "certain degree of merging or overlapping" between negligence and breach of contract, not that negligence in this case was necessarily a breach of contract (A-991-992); and (2) the sequence of the jury's findings, as revealed by its note to the court (Ct. Ex. 4, E-275), which shows that the jury determined that Industrial was negligent, either in the performance of a contract, or in the performance of its appraisal, *before* it decided there was no breach of contract.

In any event, even if there were an inconsistency in the jury's answers to Questions 1 and 2,* such inconsistency in a jury's findings as to two separate causes of action is not a ground for setting aside the jury's verdict. *Ilnicki v. Montgomery Ward*, 371 F. 2d 195, 198 (7th Cir. 1967); *York-Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F. 2d 786, 794 (5th Cir. 1971); 6A *Moore's Federal Practice*, ¶59.08 [4], at 59-142.

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*The court could have accepted the jury's unanimous decision on Questions 2-5 as a complete verdict without sending the jury back for further deliberation on Question 1, under pressure to reach agreement on that question rather than to let the whole trial "go down the drain." See Ajax Br., p. 34, fn. **; and p. 20.

II

The Second Trial

The basic issue raised on appeal from the rulings at the second trial is whether the district court improperly submitted the case to the jury, eliminating the negligence and fraud causes of action, and, on the contract cause of action, asking the jury only whether the contract had been one expressed in very special, limited and specific terms. The jury thus had no opportunity to determine whether the contract was in substance what plaintiff contended, but not expressed in the language which the court submitted, with its particular limitations and conditions, nor to determine whether there was negligence or fraud.

A. The Case Was Improperly Submitted to the Jury.

The pre-trial order said very clearly and specifically that "The issues to be tried are formulated by the Court (with the consent and agreement of the parties) as follows:

1. What were the terms of the oral agreement between plaintiff and defendant made on or about August 12, 1966?

2. Did the defendant breach the aforementioned agreement with plaintiff?

3. Was the defendant negligent in the performance of its services as plaintiff's appraiser?

4. Did the defendant commit actionable fraud against the plaintiff by any misrepresentation or concealment of material information in connection with its services as plaintiff's appraiser?

5. Assuming that the defendant breached its contract, or that defendant was negligent, or that defendant

defrauded plaintiff, was plaintiff damaged thereby, and if so, in what amount?

6. Were said damages caused by acts for which defendant is liable?" (A-25-26).

Those issues simply were not submitted to the jury by the district court.

1. *The Contract Submission*

Attempting to justify the way in which the contract question was submitted to the jury, Industrial discusses at some length the complaint* and the judge's charge, but says virtually nothing about the pre-trial order and the specific special verdict question which the court submitted to the jury. The district court did not ask the jury to determine what the terms of the oral agreement were, the first issue framed in the pre-trial order. On the contrary, the court gave the jury the terms of one possible contract and asked whether that was the contract. As in the Rumplestiltskin fairy tale, the choice of the wrong words spelled disaster. But it was the court which chose the words. Out of a multiplicity of possible oral contracts which the jury might have found, the court asked it only whether one particular contract was the one which had been established by the evidence.

Industrial says that "The District Judge properly instructed the jurors (A-1915, 1916) that it was their sole province 'to determine from the evidence * * * what the terms of the agreement were as made on or about August 12, 1966, between plaintiff and defendant'" (Ind. Br., p. 36). But the jury was not given the opportunity to say what the terms of the agreement were. They were asked simply whether certain terms, as selected by the court, were the agreement.

*Incidentally confusing the general term "a true and accurate appraisal" with the professionally significant and limited term "fair market value, in place." (Ind. Br., p. 34).

"The Court," according to Industrial "even allowed the jury to decide whether the appraisal delivered was in fact a liquidation value appraisal . . . ." (Ind. Br., p. 37). It is impossible to see how the court did that, since the special verdict form instructed the jury that if they did not find the contract to be as suggested by the court, the case was at an end. They were not asked to decide whether the appraisal delivered included a liquidation value appraisal.

When appellee addresses itself to the special verdict form, it says "the jurors were asked whether Ajax had proved that Industrial Plants had undertaken to render 'a forced or liquidation sale' appraisal" (Ind. Br., p. 37),* but does not acknowledge that a question in that form foreclosed the jury from finding "the terms of the agreement," as, in his charge, the court had "instructed" them to do (Ind. Br., p. 36).

Industrial says that "the jury could have found affirmatively for Ajax on contract breach upon the ground that the Appellee selected the wrong appraisal or prepared it carelessly, improperly or unskillfully" (Ind. Br., p. 38). Again, it is impossible to see how the jury could have determined that Industrial selected the wrong appraisal when they were not asked whether the contract was that Industrial should deliver an appraisal appropriate to the determination of whether the machinery was sufficient collateral for a contemplated loan of $250,000.*

*The exact question was whether the contract was one "to appraise the dollar amount which in defendant's opinion could be realized from the sale of individual items of machinery and equipment at the Time & Micro plant at a forced or liquidation sale" (A-250).

*Both parties to the conversation on August 12, 1966 which initiated the oral contract testified that there was mention of collateral value in connection with the appraisal (Ajax Br., pp. 59-60).

2. *The Failure to Submit Negligence*

Neither did the district court permit the jury to determine whether defendant was negligent "in the performance of its services as plaintiff's appraiser", the third issue framed in the pre-trial order. The court removed from the case all questions of negligence except for negligence in the performance of the singular contract which the court had postulated—if the jury first found that that was the contract. But as we pointed out in our main brief, the negligence cause of action is not confined to negligence in the performance of whatever contract there was;* the proof showed that the defendant was negligent in the preparation of the appraisal, whether or not there was a contract, and that it delivered its valuations knowing and intending that plaintiff would rely on them (Ajax Br., pp. 49-53).

Industrial says it is "essential' to an understanding of its position, that Ajax *received* only "a fair market value appraisal of the machinery and equipment, in place and ready for use and operation" (Ind. Br., pp. 17-18).** The argument based on that assertion is that Ajax could not rely on an "in place value" in order to determine

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*There was not "only one central issue" in the case, as Industrial says, *i. e.*, "What kind of appraisal did the contract between the parties contemplate?" (Ind. Br., p. 3), but even that question, as it related to the contract cause of action, was not submitted to the jury.

**Industrial's appraisal report itself gave two different values, however, reporting "TOTAL FAIR MARKET VALUE" as $919,085.00, and, adding an additional $137,806.00 for "In Place Value," the "TOTAL IN PLACE VALUE" as $1,056,891.00 (E-113). The very invoice which Industrial cites in support of its contention that Ajax got an "in place" valuation (Ind. Br., p. 19) bills Ajax only for the "Fair Market Value" appraisal of $919,085.00, and not for the higher "in place value" total (E-127).

liquidating value, and that therefore it does not matter whether Industrial was negligent in preparing the appraisal.

What Ajax received, however, was the subject of extensive testimony and documentary evidence. Ajax claimed that it received liquidation value as well as "fair market value" and, moreover, that it was repeatedly assured that it could rely on the values it had been given, *for collateral purposes,* and the evidence supported this claim (See Ajax Br., pp. 7-10, 61). The question for this Court obviously is not to determine what Ajax received and whether it was justified in relying on it, but to determine whether the jury was entitled to decide those questions, including whether defendant was negligent in preparing and reporting the appraisal, regardless of what the contract was.

3. *The Failure to Submit Fraud*

Appellee's argument that the fraud cause of action, the fourth issue framed in the pre-trial order, was properly removed from the jury is based also on the claim that there was no reliance on the appraisal report and, therefore, it "makes no legal difference whether it was prepared fraudulently or negligently" (Ind. Br., p. 31). Appellee also says that there was no proof of *scienter.*

There was, however, substantial, indeed overwhelming, evidence of reliance on the total appraisal report, and there was uncontradicted evidence that critical statements made in the letter* accompanying the appraisal were false and that they were nonetheless made with the knowledge that they would be relied upon and with a complete disregard by Industrial of any concern as to whether they were true or false (see Ajax Br., pp. 53-56).

*The only appraisal document containing the signature of the appraiser, for Industrial, and the seal of the corporation.

B. Industrial Fails to Establish That the Issues Which It Concedes Were Tried Were Properly Removed From the Jury.

1. *Industrial Lists the Issues*

Industrial has no difficulty in identifying what the second trial (as well as the first) was about. It says that "the proof and counter-proof on liability questions dealt with the terms of the agreement between the parties; whether Ajax received the kind of appraisal it had ordered; whether it had received the proper kind of appraisal, if a particular type had not been ordered; whether Industrial Plants had been careless in its preparation; whether the appraisal figures were accurate or inaccurate; whether Ajax was aware of the kind of appraisal it had received; *whether it relied upon the appraisal in any event;* whether it was Ajax which needed the appraisal or the lending bank; whether Industrial Plants knowingly or intentionally deceived the appellant as to its expertise or as to the utility of the appraisal it rendered; and whether any part of the claimed losses of Ajax were attributable to that appraisal" (Ind. Br., p. 8).

The jury, however, was not asked and was not allowed to determine *any* of those questions. Industrial nevertheless devotes most of its discussion with respect to the second trial to its contentions as to what the evidence establishes on all the numerous questions which did not go to the jury. Obviously that discussion cannot be directed to show that jury findings were not clearly erroneous, since the jury made no findings other than that the contract was not in the specific, precise, limited terms posed by the question submitted to them. Industrial's discussion of the evidence, therefore, can only be relevant to the implied contention that the district court was

right in removing from the jury all of the issues, which Industrial itself spells out, because the evidence could not support a finding in plaintiff's favor on any of those issues.

Ajax has shown, we believe, in its brief dated May 24, 1976, that there was more than sufficient evidence to sustain findings in plaintiff's favor on the issues of negligence and fraud and on the issue of breach of a contract for the delivery of an appraisal useful for the determination of the collateral value of the machinery appraised. We shall in this brief address Industrial's version of the evidence simply to show that it is not in accord with the record, and that the record must be distorted in order to permit Industrial to argue that the lack of evidence justified the court's removal of all of the critical issues from the jury.

2. *Industrial "Disposes" of the Issues*

Industrial's brief, like a steamroller, crushes, distorts and destroys the shape of appellant's arguments structured to present the true issues in the case. It does not answer Ajax's arguments but distorts "facts" unsupported by the record into issues which obviously belong in a junk heap.

A central theme of Industrial's argument is that Ajax did not and could not rely on the appraisal which it got from Industrial. Industrial asserts that Ajax had committed itself to guarantee the loan, which ultimately caused the loss which is the basis of the action, before it received the appraisal and thus, as a matter of *fact,* did not rely on it. Additionally, Industrial says that the appraisal was of such a type that it was not suitable for Ajax's purpose and, therefore, Ajax *could* not have relied on it.

a. The Time Sequence in the Record Shows Reliance.

According to Industrial, "the very financing transaction which counsel suggests was the reason for the appraisal *was actually consummated before the appraisal was received*" (Ind. Br., p. 24; emphasis in original). Industrial points to the date of the Ajax-Time agreement, which was August 18, 1966, and to the date of the final appraisal, which was August 19, 1966, and correctly says also that that appraisal was not received until August 22, 1966.

Industrial, however, sent Ajax a telegraphed summary appraisal dated August 17, 1966, which contained the basic information more formally presented in the August 19 appraisal. Appellee acknowledges that fact, but says that there is no proof in the record that the telegram was received before the contract closing (Ind. Br., p. 24).

There is no dispute that Ajax contracted with Industrial on August 12, 1966, to have an appraisal done. Nor is there any doubt that it was impressed upon Industrial's appraiser, Mr. Thaler, that Ajax needed results as quickly as possible. Mr. Thaler went to the Time plant and did everything that he ever did to arrive at his appraisal in one day, August 15, 1966. On the next day, he telephoned Mr. Klein, Ajax's Executive Vice President, to give him his conclusions, and agreed at Klein's request to *confirm* the oral appraisal results in a telegram, anticipating the formal report (A-1097-1100). That telegram was sent on August 17 (A-28, E-59), and Mr. Klein testified that it was received before the Loan and Security agreement with Time was executed by Ajax on August

18, 1966 and that "the telegram was the reason for going ahead with the loan agreement." (A-1100-1103; 1340-1342).*

The record thus clearly contains more than sufficient evidence that Ajax, as a matter of fact, relied on Industrial's appraisal in entering into a loan guaranty agreement. In addition, the terms of that agreement gave Ajax the option of renouncing it before September 9, 1966, under penalty of payment to Time of $20,000 (PX 4, E-60, 66). It was while that option of withdrawal was still open that the formal appraisal by Industrial, including the covering letter, was received on August 22, 1966.

The appraisal letter repeated what the telegram had said, that it was "inconceivable" that within the next two years the market value of the machinery would be less than 60 percent of the appraised values, *i. e.*, 60 percent of the total of $919,000, or $551,000 (E-97). It was only after those assurances were received, and reiterated in telephone conversations on August 30, 1966 (A-1124-1126, 1352-1353) following Ajax's request, by letter of August

*The self-proclaimed "clincher" to Industrial's argument (Ind. Br., p. 24) is but a further example of record distortion. The Hirschman appraisal was attached to the August 18, 1966 Loan and Security agreement as a temporary *inventory* of the machinery in Time's plant, subject to disapproval within 10 days (A-1342, E-60), since that agreement was signed before receipt of the complete Industrial appraisal. The Hirschman values, as Klein testified, were not considered by Ajax in connection with the agreement (A-1103). Moreover, the Hirschman appraisal was subsequently disapproved even as an inventory, and another schedule was substituted after receipt of the Industrial appraisal on August 22 (A-1342-1345). The letter agreement actually substituting a copy of the Industrial appraisal as an inventory to the Agreement was excluded on Industrial's objection (A-1342-1345, PX 26 [ID]).

23, for assurance about the liquidation value of the machinery, that Ajax, on September 1, 1966, signed a loan guaranty for Time in the amount of $270,000 (A-1353-1354, PX 11, E-119).

The record thus clearly would support a finding that Ajax sought an appraisal for the purpose of determining whether to lend some $270,000 to Time or to guarantee such a loan; that it was assured by Industrial that the minimum value of the machinery was $551,000; and that it did not firmly commit itself for $270,000 until after it had received those assurances.

b. Ajax was Entitled to Rely on Industrial's Appraisal

Alternatively to its argument that Ajax did not rely, Industrial says that Ajax could not rely on its appraisal because the contract between Ajax and Industrial required Industrial to give an appraisal of the Time machinery specifying its "fair market value, in place"*

Ignoring the record,** Industrial says that Ajax knew that it had not received liquidation value and, therefore, it could not prove that it had relied on the appraisal when it decided to guarantee the loan.

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*No such finding was made at the trial; indeed, the jury was not asked to find what the terms of the contract were. See pp. 20-21 above.

**Industrial selectively quotes from the record attempting to show that Mr. Klein knew that Industrial's appraisal did not supply forced sale or liquidation values (Ind. Br., pp. 18, 20). But the complete passage in each case destroys the argument, since he testified that he did receive liquidating values, although not in PX5 (A-1274, A-1283, A-1347-49; and see E-115-116).

If Industrial is correct, we are left with "two sophisticated businessmen" who "well knew the vast difference between the fair market value of machinery and equipment in place and ready for operation on an integrated basis, on the one hand, and the amount which might be expected to be realized at a forced sale in liquidation . . ." (Ind. Br., p. 21), who nevertheless ordered and paid for a fair market value in-place appraisal which they knew was of no use to them in determining whether to sign a loan guaranty agreement with the machinery as collateral! The truth is that they disclosed the purpose to which they would put the appraisal, *i. e.*, to determine whether they should advance money with the machinery as collateral; and that they were given an item by item appraisal of the fair market value of the machinery, but a total figure as the minimum value of all of the machinery, with the statement that they could rely upon all the values as accurate (E-118, A-1124-1126, 1352-1353).

c. Industrial Claims that Ajax Relied on a Government Contract.

Industrial also suggests to the Court that in truth Ajax relied not on the appraisal—which it so exigently sought and for which it ultimately paid $4,500—but relied on the potential profit from a fuse manufacturing contract with the United States Government. In order to make that argument, however, appellee has to misstate other dates.

Ajax had not been "awarded" a $3,500,000 Government contract "[b]y August, 1966" (Ind. Br., p. 36),* nor was

*Industrial itself, on page 39 of the same brief, refers not to the award of the contract in August, but to "The pendency of negotiations on this Government deal in the manufacture of weapons fuses in August, 1966" and "its consummation in October at the very time that Ajax executed the guaranty to the bank involved."

the agreement between Ajax and Time "revocable at any time and upon payment of a small penalty sum" (Ind. Br., p. 31). Ajax "put itself on the hook" (Ind. Br., p. 31) partially on August 18, 1966 (E-60) and completely, on September 1, 1966 (E-119), not in October, as Industrial says (Ind. Br., p. 31). Ajax had to decide whether to renounce its agreement with Time by September 9, 1966 at a cost of $20,000 (E-66). On the record, the only collateral Ajax relied on when it decided not to renounce the agreement and guaranteed the loan on September 1 was the Time machinery.

Industrial's entire account of Ajax's dealings with Time in the context of the prospective Government contract to manufacture fuses, which Ajax was seeking, has no support in the record. Ajax had no interest in Time's "financial independence" (Ind. Br., p. 30). Ajax was willing to consider a loan to Time in order to prevent the foreclosure of the machinery by a prior creditor to whom the machinery had been mortgaged (A-1230). But Ajax had no assurance that it would get—or keep—the Government contract at the time it was called upon to guarantee the loan, and had to rely on the value of the machinery without reference to the prospective contract.*

*Industrial, however, says that "the furthest thing from their [Ajax officials'] minds at that time was a sale of Time & Micro 'on the auction block' (A-1193)." (Ind. Br., p. 30). Mr. Klein's testimony at the place cited does not support that statement. The testimony was only that when Klein talked with Time's president about a subcontract which contemplated the use of the machinery if Ajax got the fuse contract, he did not talk to him about the sale of the machinery on the auction block. But when the time came to consider a loan to Time to preserve that machinery from foreclosure, Mr. Klein did talk with Mr. Thaler about an appraisal of the machinery to see whether it was worth enough as collateral to protect the loan which Ajax proposed to make or guarantee to Time. Clearly at *that* time, sale of the collateral on the auction block was dominant in Mr. Klein's mind, against the possibility that Ajax would not obtain the fuse contract.

Industrial's statements are hopelessly confused, asserting at the same time that the guaranty and the Government contract were both signed in September, and again, in October, and that the Government contract was awarded in August, and was only in negotiation at that time. The actual record cannot support any contention that Ajax so clearly relied on the Government contract, which it did not have, that the district court was justified in taking the reliance issue from the jury.

d. Industrial Claims That Its Appraisal was Accurate.

To justify the removal of the negligence cause of action from the jury by the court, Industrial denigrates the testimony of plaintiff's expert witness on appraisal practice, Mr. Sinclair, by saying that it "established nothing more than what, in his private opinion, amounted to variations from *his* views of acceptable procedures and reporting forms" (Ind. Br., p. 26). In that cursory way, Industrial dismisses from consideration all of Mr. Sinclair's testimony based upon the professional standards of the American Society of Appraisers, of which Industrial's appraiser was a senior member (See Ajax Br., pp. 13-17).

Rather than acknowledging and addressing itself to that testimony, Industrial cites an example from Sinclair's testimony to illustrate that Sinclair was "unable to state that the ultimate appraisal was in error or that value assigned to the machinery and equipment in place was inaccurate in a single respect" (Ind. Br., pp. 26-27). Industrial fails to say, however, that Sinclair in his direct testimony, was not asked and did not purport to testify about the gross inaccuracy of the valuations which Industrial gave to Ajax, but that Mr. Sinkler, the former President of the Hamilton Watch Company, was, and did

so testify.* (Ajax Br., pp. 62-63, 54-55). See also Mr. Kaefer's testimony (A-1622, A-1626-27).

e. Industrial "Justifies" the Prejudicial Admission of Evidence on Extraneous Payments.

The most unbelievable part of Industrial's brief is the section which deals with the prejudicial references throughout the trial to payments made by the Government to Ajax in settlement of its contract termination claims. Those claims did not include any claim for Ajax's loss on its guaranty to Time (A-179). Amazingly, Industrial continues to argue that it had a right to show the payment of the $249,000 as possible mitigation of damages suffered by Ajax on the guaranty loss, when the record establishes without dispute that the $249,000 was paid for other claims, and had nothing to do with the guaranty loss (A-179-183).**

Industrial says (Ind. Br., p. 40) that the termination payments "established that Ajax had suffered no pecuniary loss and therefore had failed to meet its burden of proof on the damage issue." ***

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*Industrial purports to derive comfort from Mr. Sinkler's testimony that five years after the Hamilton Watch Company closed as a watch manufacturing plant in 1967, it was sold intact to the United States Government as a fuse making plant (A-1689). "Time & Micro," says Industrial, "could have been disposed of in the same fashion" (Ind. Br., p. 29). The problem is that there is not a word of evidence in the record that supports the latter statement.

**It is as though appellee were to maintain that a plaintiff, whose car was demolished in an automobile accident in which he also suffered a broken arm, could not recover anything for his broken arm because his insurance company had paid him $5,000 for the demolished car, and the $5,000 was more than the cost of repairing his broken arm.

***And in the same brief which, in its first section, argues that, at the first trial, the amount of damages was "liquidated" and "undisputed."

Moreover, according to Industrial, it was a "proper jury consideration" (Ind. Br., p. 41) whether the $400,000 termination claim "did not have built-in insurance against liability on the Time & Micro guaranty" (Ind. Br., p. 41). The "dispassionate, objective and independent" jury (Ind. Br., p. 5) was entitled in this action to speculate about whether Ajax's termination claim was fraudulently inflated by false claims of $260,000 to cover its $161,000 loss on its guaranty!

Then, in a peroration which calls to mind the hoary tale of the parent-killer pleading his orphaned status, appellee says that even if introduction of evidence of extraneous Government payments to Ajax and reference to them during summation by defendant's counsel, contrary to the court's admonition, were in error, it was harmless error, since no substantial rights of the appellant were affected. This astonishing conclusion is put forward on the basis that the jury never reached the damage question, so that appellant could not have been hurt; it does not respond to Ajax' objection that it was the extraneous evidence and "rip-off" statements which were calculated to prejudice the jury against finding in plaintiff's favor on any theory, and thus *prevent* them from reaching the damage question (See Ajax Br., pp. 64-71).

CONCLUSION

Unfortunately, because the district court improperly set aside the verdict on liability in the first trial, plaintiff was forced to a second trial where the critical issues were not even submitted to the jury. This Court should restore the liability verdict and in lieu of the new trial on damages, which would otherwise be appropriate, enter judgment for $161,895.75 plus interest as the amount which defendant conceded after the first trial.

Respectfully submitted,

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